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OCTOBER TERM, 1978

No. 78-

ELIZABETH B. STUART, not individually, but as a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased, and **ILLINOIS INSTITUTE OF TECHNOLOGY**, a not-for-profit corporation,

Petitioners,

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a national banking association, not individually, but as a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased,

and

CHICAGO HISTORICAL SOCIETY, et al.,

Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS**

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

To: The Justices of the
Supreme Court of the United States

Petitioners, **ELIZABETH B. STUART**, not individually, but as a co-trustee under the last will and testament of Harold L. Stuart, deceased, and **ILLINOIS INSTITUTE OF TECHNOLOGY**, an Illinois corporation not-for-profit, plaintiffs in the case below, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois filed and entered in that proceeding on January 26, 1979.

OPINIONS BELOW

The judgment and opinion of the Supreme Court of Illinois filed and entered January 26, 1979 (hereinafter sometimes referred to as the "Remanded Cause" or "Stuart II"), reported at 75 Ill.2d 22; 387 NE2d 312 (1979), is reproduced as Appendix C hereto. The judgment and opinion of that court filed and entered October 5, 1977 (hereinafter sometimes referred to as the "Original Cause" or "Stuart I") reported at 68 Ill.2d 502; 369 NE2d 1262 (1977), is reproduced in pertinent parts as Appendix A hereto. The mandate of the court, entered on the October 5, 1977 opinion, is also reproduced as Appendix B hereto.

JURISDICTION

The judgment and opinion of the Supreme Court of Illinois here sought to be reversed was entered on January 26, 1979. A timely petition for rehearing in said cause was denied on March 30, 1979, without opinion, and this petition for writ of certiorari was filed within 90 days of that date. The court's jurisdiction is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

This case presents an apparent instance of majority action by a state's highest court, over dissent of two of its members, reversing in a subsequent remand proceeding in the same case the court's earlier adjudication in the original opinion expressly finding a party's entitlement to relief for which it pleaded in the complaint. The questions now presented are:

1. May a court, consistent with procedural due process under the Fourteenth Amendment, having without limitation adjudicated a party's entitlement to relief expressly pleaded in the complaint, subsequently reverse that adjud-

cation in a remand proceeding in the same cause, adopting a changed *ratio decidendi* and allowing only a part of the relief earlier awarded to that party, notwithstanding the original adjudication had become final?

2. May a court, consistent with substantive due process, having in an original proceeding finally adjudicated the rights of a party to a charitable grant then found to have vested years earlier under a testator's will, subsequently in a remand proceeding change its interpretation of the 'vesting' provisions of the will so as to then deny that party any entitlement to the accumulated earnings accruing after the vesting date, notwithstanding that the original determination had also upheld that party's pleading which expressly claimed the accrued earnings as a right of present enjoyment and possession which necessarily followed the vesting?

CONSTITUTIONAL PROVISION INVOLVED

This case involves the interpretation of the *Fourteenth Amendment, Section 1* of the Constitution of the United States, reading:

"nor shall any State deprive any person of life, liberty or property, without due process of law;"

STATEMENT OF THE CASE

A dispute of several years' duration, involving a number of issues and sub-issues, one of which remains here involved, originally arose between a corporate co-trustee and two individual co-trustees over the disposition of a large charitable trust fund created by the Will of Harold L. Stuart. The individual co-trustees, sisters of the testator, brought the original complaint, together with the ILLINOIS INSTITUTE OF TECHNOLOGY (hereinafter sometimes referred to as "IIT"), against the corporate co-trustee, CON-

TINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO (hereinafter sometimes referred to as "the Bank"). The dispute arose because the individual co-trustees and the corporate trustee were unable to agree upon a plan of distribution of the trust fund. Twenty-seven charitable institutions (hereinafter sometimes referred to as "Intervenors"), all of which were named in the plan of distribution submitted by the Bank (although several were also named in a plan submitted by the individual trustees), were granted leave to intervene in the Circuit Court of Cook County, Illinois, and subsequently opposed the contentions of the individual trustees. That court adopted without essential change the plan of distribution submitted by the Bank in preference to the plan advanced by the individual co-trustees. The Circuit Court's judgment entered November 15, 1974 finding in favor of the Bank and intervenors on counts I, II and III of the second amended complaint on which the case was tried, on appeal was later affirmed in all respects by the Appellate Court (*Northern Trust Company v. Continental Illinois Bank & Trust Co.*, 43 Ill.App.3d 169 (1976)). The Supreme Court of Illinois granted leave to appeal and later, by its opinion entered October 5, 1977 (reported in full at 68 Ill.2d 502 and reproduced in pertinent parts in Appendix A hereto) reversed the Appellate Court as to Counts I and III and affirmed that court as to Count II.

This petition for writ of certiorari relates only to the issue which arose under Count III concerning a charitable grant to IIT of \$3.5 million and IIT's entitlement to accrued earnings thereon after the vesting of the grant on June 30, 1971. Since this petition does not relate to Counts I and II of the original cause, the parts of the opinion of the Supreme Court of Illinois filed October 5, 1977 relating to those non-involved counts are omitted from consideration

herein as not pertinent and, for clarity of understanding of the Justices, are not reproduced in Appendix A hereto.

The Count III Relief and The Proceedings Relating Thereto in Stuart I

The key provisions of the Stuart Will establishing the Stuart Charitable Trust and granting broad distributive discretion to the individual co-trustees and the Bank as corporate trustee, are found in Article Fifth, paragraphs (d) and (e) of the will, reading as follows:

"(d) Until such time as all of the HALSEY, STUART & CO., INC. stock or assets shall have been sold, the Executors acting as Trustees *may in their sole judgment and discretion accumulate the net income of the trust estate and add the same to the principal (provided the accumulations shall not take place for more than (5) years)*, or may from time to time distribute the net income, or such part thereof as the Trustees in their sole judgment and discretion may deem proper, to such qualified charitable organizations as the Trustees may select. (Emphasis supplied)

"(e) Upon the completion of the sale of all stock or assets, as the case may be, of HALSEY, STUART & CO. INC., the net proceeds of such sale *shall, after payment of all expenses of administration and the creation of the trusts for the benefit of my sisters provided for in Article THIRD hereof, be distributed to such qualified charitable organizations as may be selected by my Trustees. Such distribution to qualified charitable organizations shall take place not more than five (5) years after my death. If for any reason it shall not be possible or practicable to complete distribution within that time, the Executors shall, prior to the expiration of such period of five (5) years after my death, select in writing the qualified charitable organizations to take hereunder and the proportion of my estate each such organization is to receive, and the interest of each such*

charitable organization shall vest at the expiration of such five-year period." (A. 32) (Emphasis supplied)¹

As shown more fully in Appendix D hereto, in Count III of the second amended complaint, IIT pleaded, alternatively, that it possessed a vested right under these will provisions to receive on June 30, 1971 a grant of \$3.5 million to additionally endow and support the Harold L. Stuart School of Management and Finance (for which \$5 million was earlier granted) because the Bank and the two individual trustees had all designated IIT to receive such additional grant within five years following Stuart's death, which period ended June 30, 1971. In that count IIT pleaded and specifically prayed, not only for a decree confirming its right to receive the \$3.5 million principal grant, but also for the increase, gains, income or profits accrued to the vested grant after June 30, 1971. The allegations and prayers for relief of Count III were expressly traversed and denied by the defendant Bank (A. 66) and the intervenors (R.C. 76, 89, 106, 129, 146, and 152) in their respective answers. Such pleadings remained unchanged and in that frame throughout the original case in the Circuit Court, the Appellate Court and the Supreme Court; likewise, throughout the remand cause in the Circuit Court of Cook County and the Supreme Court of Illinois (Stuart II). Thus, the "relief" sought by IIT in Count III at all relevant times expressly included the grant earnings accruing after the vesting on June 30, 1971 as an incident of such "vesting."

In Stuart I the Supreme Court of Illinois upheld IIT's contention that all three co-trustees had made written designations meeting Stuart Will requirements within the

¹ The Abstract of Record filed in the original and remand causes below is referred to by designation (A.) and references to the record, to the extent of material not contained in the abstract, are by designation (R.C.).

five-year period entitling IIT to receive the \$3.5 million grant. This was the basic rationale of the court's original opinion.²

The opinion introduced consideration of the Count III issues with the flat-out, explicit and unqualified adjudication in favor of IIT, reading:

"We determine that the circuit court erred in its denial of the relief requested by plaintiff IIT in Count III of the second amended complaint." (Appendix A, p. A-3)

The Court further stated:

"Article Fifth of Harold Stuart's will provided that if the trust could not be distributed within five years the Executors were to select the charitable beneficiaries in writing prior to the expiration of that period of time. Article Fifth further provided that the interest of the selected charities would vest at the end of the five-year period." (Appendix A, p. A-4) (Emphasis supplied)

Concluding that all trustees had so selected IIT as a charitable beneficiary to receive an additional \$3.5 million grant within the five-year period and that the attempt of the Bank to withdraw its proposal for such additional grant to IIT was arbitrary and unreasonable and hence ineffectual, the Court next found:

"The trustees had, in effect, all proposed the \$8.5 million [including the \$5 million grant originally made] was the minimum amount IIT should receive. The trial court should have accepted this figure as an amount over which the trustees had reached agreement as was specifically stated in the Bank's pleadings. Because

² The opinion of the court filed on October 5, 1977 specifies the documents whereby the individual co-trustees evidenced their written designation of IIT to receive the additional \$3.5 million grant and likewise the written designations of the Bank made by a letter and by its pleadings to the original complaint. (Appendix A, pp. A-3 to A-4)

there was no evidence to suggest that the amount of this grant subsequently became unreasonable or inappropriate, *the circuit court erred in failing to find for IIT as to Count III.* We hold, therefore, that upon remand an order be entered directing that an additional \$3.5 million of the estate be distributed to IIT." (Bracketed material and emphasis supplied) (Appendix A, pp. 5, 6)

Subsequently, the only petition for rehearing filed with the Supreme Court of Illinois in Stuart I by intervenor, Museum of Science and Industry, was denied. It did not relate to Count III. The mandate of the Court was thereupon issued on December 2, 1977 adopting and incorporating by reference and attachment the court's opinion of October 5, 1977. (Appendix B, p. B-1) It directed the cause to be remanded to the Circuit Court of Cook County "for modification and further proceedings consistent with the opinion attached to this mandate." (Appendix B, p. B-2) The controversy presented by the instant petition for writ of certiorari then ensued.

Count III Proceedings in The Remand Cause (Stuart II)

Upon remand to the Circuit Court of Cook County, that court entered a modified judgment order conforming to the reversal and affirmance, respectively, of counts I and II of the second amended complaint, as to which no controversy existed on remand; also reversing the trial court's erroneous count III finding in the judgment order of November 15, 1974, which had disallowed the \$3.5 million grant to IIT, by directing the principal amount thereof to be paid to IIT. The trial court, however, left in abeyance and reserved jurisdiction to determine the question of IIT's entitlement to the earnings, increases, gains, income and profits accruing

with respect to the \$3.5 million vested grant and directed a reserve in the sum of \$2.2 million to be held by the trustees pending final disposition of the question of IIT's entitlement to earnings accruing on the vested grant over the more than six years since June 30, 1971 while the cause was in litigation. (A. pp. 108, 112)

The plaintiffs, Elizabeth B. Stuart, as surviving individual co-trustee, and IIT, then concurrently filed a petition for accounting of the trust funds held by the Bank and *inter alia* for an order distributing all the accrued earnings of the \$3.5 million grant to IIT. On motions of the Bank and intervenors and petitioners' reply thereto³ (A. 137), the Circuit Court of Cook County on April 20, 1978 entered its final order of partial dismissal of the petition for accounting, ruling that certain intervenors, not IIT, were to receive the earnings from IIT's \$3.5 million vested grant. (A. 157) From that order Elizabeth B. Stuart, as surviving individual co-trustee, and IIT prosecuted their appeal to the Supreme Court of Illinois, direct review having been granted by the court pursuant to its rules.

³ The inescapable Fourteenth Amendment considerations of due process involved in the trial court's ruling, which denied IIT the earnings on its \$3.5 million vested grant, were unambiguously presented to the Circuit Court of Cook County in the Reply to the Motions to Dismiss the Petition for Accounting, (A. 137, para. 7 of Reply), stating,

"Any distribution of the income, earnings and profits on IIT's vested grant of \$3.5 million to Intervenors or any other than IIT would constitute an obvious violation of the constitutional rights of IIT by depriving it of property without due process of law in violation of § 1 of the Fourteenth Amendment to the United States Constitution . . ."

Following submission of briefs⁴ and oral argument by the parties in the remand cause, the Supreme Court of Illinois filed a divided opinion on January 26, 1979 (Stuart II) whereby the majority affirmed the judgment order of the Circuit Court entered April 20, 1978, denying IIT's claim under Count III to the accrued grant earnings. A dissenting opinion was filed by Mr. Justice Robert C. Underwood, concurred in by Mr. Justice Thomas J. Moran, who upheld IIT's right to the accrued earnings. (Appendix C, pp. C-6 to C-9)

The majority of the court in denying grant earnings to IIT under Count III in Stuart II, while allowing only the principal vested grant of \$3.5 million to stand, also then awarded those grant earnings to other charitable intervenors under what the majority described as the "accumulation excess residue" clause in the original trial court judgment order of November 15, 1974. (A. p. 69) In Stuart II the Supreme Court of Illinois expressed a new rationale of decision not mentioned or relied on in the original opinion, viewing IIT's claim under Count III as now resting upon the equitable discretion of the trial judge, in the

⁴ In its Opening Brief in the Supreme Court of Illinois, IIT again asserted that to deprive IIT of the grant earnings as proposed by the trial court in its order of April 20, 1978 would constitute an unconstitutional deprivation of property without due process. At page 28 the brief asserted, "Such an unlawful distribution of the earnings of the vested grant is a deprivation of property without due process of law in violation of § 1 of the Fourteenth Amendment of the Constitution of the United States . . . /A/s pointed out by the Supreme Court of the United States in *Chicago, Rock Island and Pacific Railway Co., et al. v. United States, et al.*, 284 U.S. 80, 96 (1931). "Confiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title." Similarly, in IIT's Reply Brief in Stuart II, IIT devoted § 4 thereof, pages 19 and 20, to a renewal of its insistence that the trial court's order of April 20, 1978 "necessarily amounts to confiscation of property without due process of law in violation of federal and state constitutional provisions."

circumstances of a deadlock between the three trustees, "to formulate a plan of distribution of the entire fund." (Appendix C, p. C-4) The majority now found that *both sides* (Stuart and IIT, on the one hand, as well as the Bank and intervenors on the other) had joined in such an appeal for equitable discretion. This new reasoning, relying on equitable discretion as the basis of the award of the \$3.5 million grant to IIT, found no expression whatever in the original opinion of October 5, 1977, where the court earlier had adjudicated IIT's entitlement to the relief sought in Count III, as following from the fact that *all* of the Stuart trustees had effectively designated IIT prior to June 30, 1971, thereby "vesting" the grant as mandated in Article V, § 1, paragraph (e) of the Stuart will.

The majority opinion in Stuart II is wholly silent with respect to the prior specific adjudications in the original opinion that "the circuit court erred in its denial of the relief requested by plaintiff, IIT, in Count III of the second amended complaint," (Appendix A. p. A-3) and that "the circuit court erred in failing to find for IIT as to Count III." (Appendix A, p. A-6) The opinion of the majority in Stuart II contains no mention of and simply ignores the express allegations in Count III and the prayer for relief, which specifically sought all accrued earnings after the vesting of that grant on June 30, 1971. The dissenting opinion of Mr. Justice Underwood, concurred in by Mr. Justice Moran, points up the disparities between the opinions of October 5, 1977 and January 26, 1979, and sets forth the reasons why in the minds of those justices the original opinion established IIT's entitlement to the grant earnings. (Appendix C, pp. C-6 to C-9)

The court's mandate in Stuart II issued on April 11, 1979. It was recalled on May 7, 1979 on motion of Petitioner IIT pending the timely filing of a petition for writ of certiorari in this Court, and until the Supreme Court of the United States shall have acted upon it.

REASONS FOR GRANTING THE WRIT

Introduction

The due process arguments relied on for issuance of the writ are premised on petitioners' contention that the Supreme Court of Illinois, when called upon to enforce its opinion of October 5, 1977 and related mandate in *Stuart I*, after the opinion had become final, impermissibly shifted its position by adopting a totally changed *ratio decidendi* reversing final adjudications in the original opinion which established IIT's right to the accrued earnings. Those earnings, amounting to approximately \$1.5 million, are now being diverted to intervenors, who were strangers to the Count III vested grant. Accordingly, in this introduction, petitioners respectfully present an explanation of why the original opinion of October 5, 1977 constituted a binding and final adjudication and established, as the law of the case, IIT's entitlement to the grant earnings.

In an early pronouncement of the purposes of the doctrine of *res judicata*, equally applicable today to issues of the instant case, this Court observed in *Johnson Steel Street Rail Co. v. Wharton*, 152 U.S. 252, 38 L.Ed. 429, 14 S.Ct. 608 (1893), at 257:

"The object in establishing judicial tribunals is that controversies between parties, which may be the subject of litigation, shall be finally determined. The peace and order of society demand that matters distinctly put in issue and determined by a court of competent jurisdiction as to parties and subject matter, shall not be retried between the same parties in any subsequent suit in any court."

Similarly, in *U.S. v. U.S. Smelting, Refining & Mining Co.*, 339 U.S. 186, 94 L.Ed. 750, 70 S.Ct. 537 (1950), this Court

dealt with the doctrine of "law of the case" ("a kindred rule of the doctrine of *res judicata*"). Petitioners submit that under both of these related doctrines, IIT's right to the disputed earnings was settled in the original opinion.

The Specific Adjudications of "Count III Relief" Made in *Stuart I*

First, in *Stuart I*, IIT's right thereto was indeed "distinctly put in issue" and was "determined by a court of competent jurisdiction" within the meaning of *Johnson Steel* and its progeny. There can be no question concerning the scope of the pleadings under Count III of the second amended complaint, for there IIT twice pleaded for "increases, gains, earnings or profits" on the \$3.5 million grant accruing after June 30, 1971. The record is also clear that those allegations were specifically denied and traversed by the Bank and all intervenors. Consequently, those pleadings were merged into, expressly adjudicated, and the issue of earnings was disposed of in favor of IIT in the October 5, 1977 judgment order and opinion of the Supreme Court of Illinois and its subsequent confirming mandate. In the *Stuart I* opinion, the Court resolved the matter so "put in issue" thus: "We determine that the circuit court erred in its denial of the *relief requested* by plaintiff IIT in Count III of the Second Amended Complaint"; also, in a second like finding: ". . . the circuit court erred in failing to find for IIT as to Count III." (Appendix A, pp. A-3, A-6) (Emphasis supplied)

In neither of these two explicit and unequivocal determinations did the court limit its reference to the Count III "relief requested" only to the principal grant of \$3.5 mil-

lion or eliminate the prayed-for relief of grant earnings.⁵ The quoted words of the court are clear and unambiguous and should be taken as written and to mean what they say; otherwise, court decisions would have no finality or certainty of meaning whatever.

The Original Adjudication of a "Vested Grant" to IIT Under Stuart Will as Pleaded in Count III

Secondly, the opinion of October 5, 1977 initially and correctly sustained the fundamental vesting theory contended for by IIT in Count III, an interpretation of vesting in *present enjoyment* after June 30, 1971 directed by the Stuart Will itself in the case of a grant to a charity like IIT selected by all trustees within the five-year period prescribed in the will. Article V(d) of the will expressly prohibits accumulation of income beyond the five-year period. Selection of IIT by all trustees was expressly found to have occurred by the court in its October 5, 1977 opinion. In fact, a reading of the full opinion of the Stuart Will discloses that IIT was the only

⁵ In the dissenting opinion, Mr. Justice Underwood wrote:

"I believe that it was implicit in our earlier opinion in this case that IIT was entitled to interest on its grant of \$3.5 million. In our October 1977 opinion it was determined 'that the circuit court erred in its denial of the relief requested by plaintiff IIT in count III of the second amended complaint.' (68 Ill.2d 502, 533). While that opinion did not refer specifically to the question of interest on the \$3.5 million, the relief requested by plaintiff IIT in count III of its second amended complaint included an amount for 'increases, gains, earnings or profits' on the \$3.5 million grant. Since the majority opinion concedes that 'we did not specifically exclude an increase of the IIT grant in the earlier opinion,' it would seem more logical to resolve the ambiguity by referring to the pleadings to determine what relief was requested, since we concluded that the circuit court had erred in its denial of the relief requested by IIT." (Emphasis supplied)

charity selected by the three trustees to receive a vested grant under the specific will provisions. Thus, in Stuart I the court correctly rested its adjudication on the controlling provisions of the will, not on the basis of a discretionary judicial 'parceling-out' of trust funds to IIT. Here again the opinion of the court filed January 26, 1979 is shown to rest upon a totally changed *ratio decidendi*, to the prejudice of IIT's established rights. In so shifting its position, the court in Stuart II, also for the first time, adopted a new interpretation of the Stuart will, defining "vesting" as merely a *designation* of ultimate grantee status, and thus blocked out the economic benefits to IIT during the period required to litigate its entitlement, in this instance, a period of more than six years.

Again, the court's opinion of January 26, 1979 was erroneous in holding that IIT had invoked the equitable discretion of the trial judge by seeking his "formulation of a plan of distribution." That never, in fact, occurred. As correctly found originally in Stuart I and as pleaded in Count III, IIT never sought the accrued earnings as a discretionary "hand-out" from the trial judge, but always rested its claim on the terms of Harold L. Stuart's will. It looked solely to the provisions of that will and the facts originally found by the Supreme Court of Illinois that IIT had been selected by all trustees. The court's shift away from the Will provisions to a theory of judicial discretion in Stuart II was obviously error and should not defeat IIT's rights as finally adjudicated in Stuart I.

The opinion of January 26, 1979 fails to mention, much less to discuss, either of these two basic showings of the binding adjudication in favor of IIT which occurred in the original opinion and the mandate (Appendix B) which accompanied it. Instead, the Court proceeded to plough new ground and embraced new theories of decision. A reading

of the two opinions, as they pertain to Court III relief, particularly the dissenting opinion of Mr. Justice Underwood (concurred in by Mr. Justice Moran), will demonstrate to this Honorable Court that the decision in Stuart II cannot logically co-exist with its forerunner, which had already become final.⁶

The Court's Mistaken Adoption in Stuart II of The Inapplicable "excess residue" Clause

Finally, in changing the *ratio decidendi*, the Court not only excluded IIT from the grant earnings but awarded them to intervenors. This was done under an erroneous application of an unrelated "excess residue" clause written into the November 15, 1974 judgment order of the trial judge. That order could not conceivably have been fashioned to govern disposition of accrued earnings on a grant to IIT since the trial court in the same order *totally denied* all Count III relief. The January 26, 1979 opinion in Stuart II seems to say that even though the trial court then erroneously failed to grant the principal amount of IIT's Count III claim for relief, the trial court, nevertheless, had *correctly and anticipatorily disposed of IIT's claim for accrued earnings.*

This Honorable Court should also note that in the Stuart I opinion the court's comments on the "excess residue" clause (Appendix A, pp. A-7 to A-8) did not relate to the

⁶ It is beyond question that the October 5, 1977 decision of the Supreme Court of Illinois in Stuart I was a final decision. No petition for rehearing was granted. No petition for a Writ of Certiorari from the United States Supreme Court was filed. "It has long been the rule that after thirty days has elapsed, a decree becomes final and the court cannot amend it except as to form." *People v. Lewe*, 380 Ill. 531, 44 N.E.2d 551 (1942). See also *Illinois National Bank of Springfield v. Gwinn*, 390 Ill. 345, 61 N.E.2d 249 (1945).

Count III grant but were in an entirely different setting. Nothing said there logically related to the issue of the Count III entitlement of IIT to accrued earnings on the \$3.5 million vested grant. What was dealt with there was the contention of both the Museum of Science and Industry and IIT that an unexpected enhancement of the Stuart Charitable Trust Fund by millions of dollars after the November 15, 1974 order, warranted at least a review of the equity of the trial court's discretionary distribution plan. In Stuart II petitioners in no way sought to relitigate the court's determination to the contrary involving the excess residue clause nor to relitigate any other issue. They only sought in the remand cause proper enforcement of the court's opinion of October 5, 1977 as it related to Count III.

I. THE OPINION IN STUART II DENYING IIT THE ACCRUED EARNINGS CONSTITUTED AN EVIDENT REWRITING OF THE ORIGINAL OPINION IN VIOLATION OF FUNDAMENTAL PRINCIPLES OF PROCEDURAL DUE PROCESS WHICH ARE BASIC IN OUR SYSTEM OF JURISPRUDENCE.

Petitioners rely upon the long-established common law doctrines of *res judicata* and law of the case which require adherence to final adjudications where the issues and the parties are identical, whether the subsequent litigation occurs in the same court or in another court. The instant application of these settled procedural rules may not be clouded by doctrinal exceptions which are inapposite. Obviously irrelevant are exceptions to *res judicata* or law of the case doctrines involving instances of appellate departure from *stare decisis* or situations involving changes in decisional law subsequently applied in a second appellate proceeding, involving no finality of the original decision; Cf. *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364: nor does the instant case present a situation

of newly-considered evidence on an open record in a cause where the original adjudication had not attained finality; *Cf. U.S. v. U.S.S. Melting, Refining & Mining Co.*, 339 U.S. 186, 198-199. Here, more than a year after the point of finality had been passed under settled civil procedure, the court in Stuart II reversed its earlier decision. It referred to no change of decisional law governing interpretation of the Stuart Will, nor to any new interpretation of the controlling pleadings of "vested right" to earnings in Count III.

The rule of law of the case, likewise, cannot be clouded here by the dichotomy in the authorities, some of them hold the rule to be absolute, "right or wrong", even precluding correction of error, others holding that the rule is qualified to the extent of permitting the correction of error by the appellate court in a second review. See Annotation 87 ALR 2d 271, 279-299, *Erroneous Decision as Law of the Case on Subsequent Appellate Review*. It will be noted that there is no suggestion in Stuart II, nor could there be, that the court purported to be pursuing a correction of error in its prior opinion of October 5, 1977.

Petitioners, therefore, submit that the doctrines of *res judicata* and law of the case unqualifiedly apply to what occurred in the cause below and govern resolution of the conflicting and inconsistent opinions of the court relating to the Count III relief sought by IIT.

In raising the federal constitutional questions, petitioners recognize that what is due process of law depends on the circumstances and necessities of a particular situation. One authoritative interpretation, focusing on procedural aspects of due process, particularly applicable to the circumstances and necessities of the instant case, is stated in *Constitution*

of the United States of America, Rev. and Annot., 1972 Edition, page 1406:

"By due process of law is meant one which, following the forms of law, is appropriate to the case and just to the parties affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and whenever necessary to the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. Any legal proceeding enforced by public authority, whether sanctioned by age or custom or newly devised in the discretion of the legislative power, which regards and preserves these principles of liberty and justice, must be held to be due process of law." See *Hagar v. Reclamation District*, 111 U.S. 701, 708 (1884); *Hurtado v. California*, 110 U.S. 516, 537 (1884).

It requires no citation of authority to assert that the traditional doctrines of *res judicata* and law of the case are basic procedural principles of our common law inheritance. There are few matters of process of greater importance to the *due administration of justice* than these. Both have long been recognized and given enforcement by this Honorable Court and throughout the American judicial system. These are principles required to achieve settled justice, finality of court resolution and future predictability. These are essential to assure parties who have once placed in issue their civil disputes and obtained determinations thereof by a court of competent jurisdiction that they have, in fact, received their day in court and a resolution of their rights or obligations. *Johnson Steel Street Rail Co. v. Wharton*, *supra*. These rules indeed provide a civil process which is constitutionally "due," precluding a court on second review from ignoring its earlier adjudication.

A litigant has a constitutional right to rely upon the protection afforded by the doctrines of *res judicata*, and law

of the case, which right is protected against violation in any subsequent judicial proceeding. This Court has held that “[A] right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies . . .” *Southern Pacific Railroad Co. v. United States*, 168 U.S. 1, 49, 18 S.Ct. 18, 27, 42 L.Ed. 355 (1897). It has declared that this is the rule “. . . even though the determination was reached upon an erroneous view or by an erroneous application of the law.” *United States v. Moser*, 266 U.S. 236, 242, 45 S.Ct. 66, 67 (1924).

It has recently been held, in a case indistinguishable in principle from the instant case, “that where refusal of a state court to apply *res judicata* in a second proceeding, results in a direct, actual and irreparable loss of property, that refusal must be said to be so fundamentally unfair as to abridge the owners’ constitutional right to due process.” *Sotomura v. County of Hawaii*, 460 F.Supp. 473 (1978). The circumstance that the offending action is that of a state court does not render the departure from due process any less a federal concern.

In *Shelley v. Kraemer*, 334 U.S. 1, 18, 92 L.Ed. 1161, 68 S.Ct. 836 (1948), this Court noted that the Fourteenth Amendment protections extend to the action of state courts as well as to other state infringements. The Court said:

“The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials. Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment’s prohibitory provisions, it has never been suggested

that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government.”

There have been other situations in which it has been held that the procedures of state courts violate federal due process. The action of state courts in imposing penalties or depriving parties of other substantive rights, without providing adequate notice and opportunity to defend, has long been regarded as a denial of due process of law guaranteed by the Fourteenth Amendment. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930). Due process of law, when applied to judicial proceedings, means a course of legal proceedings according to rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877). It requires a proceeding which follows forms of law appropriate to the case, and just to the parties affected. *Endicott Co. v. Encyclopedia Press*, 266 U.S. 285 (1924). Procedural due process rights attach where state action condemns a person to “suffer grievous loss of any kind.” *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951).

II. DENIAL IN STUART II OF ILLINOIS INSTITUTE OF TECHNOLOGY’S RIGHT TO THE ECONOMIC BENEFITS AND USE OF ITS GRANT, WHICH ADMITTEDLY HAD VESTED MORE THAN SIX YEARS EARLIER, CLEARLY IS A DEPRIVATION OF SUBSTANTIVE DUE PROCESS.

The newly pronounced interpretation by the majority in Stuart II that “vesting” under the Stuart Will constituted essentially no more than a mere designation of a grant recipient who would take at the end of prolonged litigation ultimately resolved in its favor (carrying with it no present economic benefit or enjoyment after the vesting date

of June 30, 1971),⁷ is both inconsistent with vesting theory originally adopted by the court in Stuart I and contrary to the express mandates of the Harold L. Stuart will as written in Article V(d) (e). This inconsistency between the opinions of October 5, 1977 and January 26, 1979, illustrative of still another violation of the doctrines of *res judicata* and law of the case, is best explained in the dissenting opinion of Mr. Justice Underwood (Moran, J. concurring), as follows:

"More fundamentally, however, it seems contrary to logic and reason to declare, on the one hand, that IIT had a vested right to the \$3.5 million grant as of June 30, 1971, but on the other hand to deny IIT any right to the interest which accrued on this grant during the subsequent course of this protracted litigation. The result reached by the majority seems especially unsound when one considers article V(e) of the Stuart will, which provides:

'/T/he Executors shall, prior to the expiration of such period of five (5) years after my death, select in writing the qualified charitable organizations to take hereunder and the proportion of my estate each such organization is to receive, and the interest of each such charitable organization *shall vest at the expiration of such five-year period.*' (Emphasis added.)

Since IIT was selected as a charitable organization to take under the will within the 5-year period immediately following the testator's death on June 30, 1966,

⁷ Since no accounting of the accrued earnings over 6 years on the \$3.5 million vested grant has as yet been allowed, it could only be estimated in the court below that the amount of accrued earnings at issue ranges between \$1,250,000 and \$1,500,000, although a reserve fund continues to be held in the amount of \$2,200,000. (IIT's Opening Brief in Stuart II, p. 8)

its interest 'vested' on June 30, 1971, pursuant to the express terms of the will."

* * * * *

"Article V(d) of the Stuart will, which the majority opinion fails to discuss, provides as follows:

'The executors acting as trustees may, in their sole judgment and discretion, accumulate the net income of the trust estate and add the same to principal (*provided the accumulations shall not take place for more than five years*), or may from time to time distribute the net income, or such part thereof, as the trustees in their sole judgment and discretion may deem proper, to such qualified charitable organizations *as the trustees may select.*' (Emphasis added.)

This clause, to me, demonstrates the testator's intent that accumulations of net income may be added to the general residue of the trust estate only for the 5-year period immediately following the testator's death. The only reasonable interpretation of this clause, when read in conjunction with article V(e) is that the testator intended the charitable organizations designated within the prescribed 5-year period to come into present enjoyment and possession of their grants on June 30, 1971. After that date, any accumulation of interest would belong, as of right, to the appropriate designated charity and could not be added to the general residue of the trust estate."

Petitioners do not ask this Honorable Court to involve itself in a resolution of a state issue of will construction. However, petitioners do assert that once the court below, in its original opinion of October 5, 1977, determined the issue of entitlement to the accrued earnings as specifically pleaded by IIT in Count III, the court thereafter had no authority, constitutionally, to adopt a different and altered theory of "vesting", when it was asked to enforce its original mandate in Stuart II. As shown in Appendix D hereto, ex-

pressly placed in issue in the original cause was the question of whether earnings accruing on a vested grant after June 30, 1971 necessarily accompanied the grant *as an incident of vesting*. Thus, Count III of the Second Amended Complaint in paragraph 17, pleaded the following:

"The aforesaid conjoint written selections and designations of IIT by all trustees to receive the further sum of \$3,500,000 from the trust estate occurred within five (5) years following the death of Harold L. Stuart and accordingly under the provisions of Article FIFTH (e) of the Will, the additional grant of \$3,500,000 to IIT became vested and indefeasible and in equity was funded. As soon as practical after June 30, 1971, the fifth anniversary of decedent's death, it was and became the duty of the trustees to pay said additional sum of \$3,500,000 to IIT together with any increase, gains, earnings or profits, which have been received or accrued with respect to that fund after June 30, 1971." (Appendix D, pp. 7-8)

Accordingly, there can be no doubt that the meaning of vesting in the Stuart Will was placed at issue before the court and finally resolved by it in the original cause when it found that the trial court had "erred in its denial of the relief requested by plaintiff IIT in Count III."

The diversion of the large sum of grant earnings from IIT to intervenors as would result from the court's decision of January 26, 1979, necessarily constitutes a deprivation of property without due process of law in violation of § 1 of the Fourteenth Amendment. *Sotomura v. County of Hawaii, supra.* As pointed out by this Court in *Chicago Rock Island and Pacific Railway Co., et al. v. United States, et al.*, 284 U.S. 80, 96 (1931), "confiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title." See also *Chicago, Minneapolis and St. Paul Railway Co. v. Minnesota*, 134 U.S. 418, 458; *Reagan v. Farmer's Loan & Trust Co.*, 154 U.S. 362,

412; Chicago, Minneapolis and St. Paul Railway Co. v. Wisconsin, 238 U.S. 491.

It has been similarly recognized in eminent domain cases that the constitution requires that the landowner be compensated for the use of his property for the period between the taking of the property and the actual payment of compensation therefor. In *United States v. 355.70 Acres of Land, etc.*, 327 F.2d 630, 632 (3rd Cir. 1964), a landowner sought interest on the value of his condemned property from the time of the taking until time of actual payment of compensation. In reversing the trial court's denial of his claim for interest, the court noted:

"In deciding what is just compensation for a public taking of private property, courts normally determine and award the fair value of the property at the time of the taking. But usually the taking occurs at the beginning of the condemnation proceeding, while the award comes at the end. This means that there is likely to be a substantial period during which the owner has neither his land nor equivalent value in money. In such circumstances, *just compensation must include, in addition to fair value at the time of taking, an award for the intervening deprival*. To supply this essential element of just compensation, Congress has required that the United States pay 6 per cent interest upon the value at taking from that date until the award is made and paid." 40 U.S.C. § 258(a). (Emphasis added.)

There could be no clearer illustration of an arbitrary and unreasonable taking of the use of property without compensation than the trial court's order of April 20, 1978, upheld by the judgment and opinion of the Supreme Court of Illinois entered January 26, 1979, which takes from IIT the full economic value and use of a \$3.5 million fund over a period of more than six years, being the time required to litigate the issues of Count III and to vindicate IIT's rights, in the face of resistance presented throughout the case by the defendant Bank and intervenors.

CONCLUSION

For the reasons stated above, Petitioners respectfully pray that their petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

IN THE

SUPREME COURT OF ILLINOIS

ELIZABETH B. STUART, not individually, but as a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased, and ILLINOIS INSTITUTE OF TECHNOLOGY, a not-for-profit corporation,

Plaintiffs-Appellants,
vs.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a national banking association, not individually, but as a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased.

Defendant-Appellee,

CHICAGO HISTORICAL SOCIETY, et al.,
Intervenors, Defendants-Appellees.

Appeal from the Appellate Court for the First District; heard in that court on appeal from the Circuit Court of Cook County, the Hon. Francis T. Delaney, Judge, presiding.

OPINION FILED OCTOBER 5, 1977—REHEARING DENIED NOVEMBER 23, 1977

MR. JUSTICE RYAN delivered the opinion of the court:

This appeal involves a dispute between a corporate co-trustee and two individual co-trustees concerning the disposition of a large charitable trust fund created by the will of Harold L. Stuart. The individual co-trustees, the sisters of the late Harold L. Stuart (hereinafter referred to as the Stuart sisters), brought the original complaint together with a co-plaintiff, the Illinois Institute of Technology (hereinafter referred to as IIT), against the corporate co-trustee, the Continental Illinois National Bank and Trust Company (hereinafter referred to as the Continental Bank).

The dispute arose because the individual co-trustees and the corporate trustee were unable to agree upon a plan of distribution. Additionally, 27 charitable organizations, which were named in the plans of distribution submitted by the co-trustees, were granted leave to intervene in the lower court. The circuit court of Cook County essentially adopted the plan of distribution submitted by the corporate co-trustee in preference to the scheme of distribution advanced by the individual co-trustees. The circuit court's judgment was affirmed in all respects by the appellate court. (*Northern Trust Co. v. Continental Illinois National Bank & Trust Co.* (1976), 43 Ill. App. 3d 169). We granted leave to appeal pursuant to our Rule 315(a) (58 Ill. 2d R. 315(a)) and now affirm the decision of the appellate court in part, and reverse that decision in part.

The facts involved in the present appeal are lengthy and complex. A full statement of the facts is included in the opinion of the appellate court, and we shall set out only those facts necessary for an understanding of our disposition of this case.

Harold L. Stuart died on June 30, 1966. He was unmarried and was survived by his two unmarried sisters. He was a renowned financier and investment banker and was the president and sole stockholder of the investment banking firm of Halsey, Stuart and Co., Inc. All parties agree that Harold Stuart was devoted to the city of Chicago, and that his lifelong desire was to build the city into a financial center. The testator left a multimillion dollar estate which presently is valued in excess of \$26 million.

Harold Stuart's will was executed on April 23, 1964. It named the Continental Bank and his two sisters as co-executors and co-trustees. The will provided for the crea-

tion of two \$1 million trust funds to provide life estates for each sister with the remainders to charity. The remainder of his estate was to be distributed to qualified charitable organizations. The will did not mention specific charities, but rather vested the discretion to select charitable beneficiaries in the co-trustees. Under the will, the trustees were to select these charities within 5 years of the testator's death.

* * * *

[Substantial portions of the court's opinion, at this point, relating to issues under counts I and II have been omitted for the convenience of the Justices. Should it be found desirable by them to examine these omitted portions the attention of the Justices is respectfully invited to the reports at 68 Ill.2d 502, 512 to 533; 369 N.E.2d 1262, 1266 to 1267].

We determine that the circuit court erred in its denial of the relief requested by plaintiff IIT in count III of the second amended complaint. In that count, IIT asserted a vested right to an additional \$3.5 million of the estate. The facts relevant to this issue may be briefly restated. A formal "Statement of Intent" dated October 10, 1968, was signed by the Stuart sisters designating IIT to receive \$8.5 million. Subsequently, \$5 million was distributed to IIT, but the Stuart sisters never ceased their efforts to have that institution receive a greater amount. In a letter dated October 7, 1970, the bank designated IIT to receive an additional \$3.5 million as part of a total plan of distribution. This letter read in pertinent part:

"1. Increase the trust's present commitment to the Illinois Institute of Technology by an additional \$3,500,000 (To be used for endowment and Chicago-Kent College of Law. This raises the total commitment to IIT to \$8,500,000, the amount you originally suggested.)"

This letter was by coincidence drafted on the same date that IIT and the Stuart sisters filed their original complaint. In its answer to the complaint filed November 9, 1970, the bank reiterated this proposal, stating that "at the present time there is a disagreement among the trustees insofar as defendant proposes a total gift of \$8.5 million to IIT while the individual trustees demand a grant to IIT equal to three-quarters of the available trust assets." The bank also prayed that the court direct distribution in accordance with its plan which included a total grant to IIT of \$8.5 million. On June 15, 1971, the bank withdrew this proposal in a letter to the Stuart sisters. At the time of the sisters' final proposal of three-quarters of the estate to IIT, the bank had advised the sisters that approximately \$9 million would be available for distribution.

Article Fifth of Harold Stuart's will provided that if the Trust could not be distributed within 5 years the executors were to select the charitable beneficiaries in writing prior to the expiration of that period of time. Article Fifth further provided that the interests of the selected charities would vest at the end of the 5-year period. IIT contends that the sisters' "Statement of Intent" of October 10, 1968, and the bank's letter of October 7, 1970, constitute a written designation of IIT as the beneficiary of an \$8.5 million grant. The appellate court rejected this argument, reasoning that there had been no simultaneous selection of IIT to receive \$8.5 million, and that there was no "meeting of the minds" because the sisters had designated IIT for three-quarters of the estate. 43 Ill. App. 3d 169, 198-99.

We initially note that resolution of this issue does not call for a resort to the niceties of contract law rules concerning offer and acceptance. It is apparent from the record before us that all three trustees had designated IIT

as the recipient of at least \$8.5 million by the time this unfortunate controversy reached the courts. As its own pleadings indicate, at the time the suit was filed the bank proposed an \$8.5 million grant to IIT. The only disagreement stemmed from the fact that at that time the Stuart sisters had designated IIT to receive three-quarters of the available estate. The bank's decision to withdraw its proposal for an additional grant to IIT did not occur until some time after this litigation had commenced.

Our review of the record leads us to the inescapable conclusion that the bank withdrew its earlier proposal because of the then pending litigation and because the Stuart sisters would not endorse its total plan of distribution. The testimony of the bank officer charged with the overall supervision of the trust reveals no reason for the bank's withdrawal of the additional grant to IIT except that it was precipitated by the sisters' refusal to assent to the bank's total demands. Additionally, the bank officer could not recall the reason that certain of the other grants had been raised after the additional \$3.5 million to IIT was withdrawn. These increased grants, together with several new gifts, were roughly comprised of the amount previously earmarked for IIT. In short, no evidence was offered to support the reduction in IIT's designation.

From the record before us, we can only determine that the bank's withdrawal of its proposal for an additional grant to IIT was arbitrary and unreasonable. The trustees had, in effect, all proposed that \$8.5 million was the minimum amount IIT should receive. The trial court should have accepted this figure as an amount over which the trustees had reached agreement, as was specifically stated in the bank's pleadings. Because there was no evidence to suggest that the amount of this grant subsequently became un-

reasonable or inappropriate, the circuit court erred in failing to find for IIT as to count III. We hold, therefore, that upon remand an order be entered directing that an additional \$3.5 million of the estate be distributed to IIT.

* * * *

[That portion of the opinion which is omitted at this point, concerns a grant to intervenor Chicago Historical Society, which is not pertinent to the issues herein. Once again the Court's attention is respectfully directed to the full opinion at 68 Ill. 2d 502, 536 to 537; 369 NE 2d 1262, 1277 to 1278, for the omitted portion.]

The Museum of Science and Industry, an intervenor, contends that the trial court's judgment is against the manifest weight of the evidence in that the museum is limited to a gift of \$50,000, and, as a group 3 charity under the bank's plan, is prevented from sharing in the residual amount of the estate. The museum contends that, due to its size and the extent of its operations, it should be classified as a group 1 charity under the bank's approved plan rather than as a group 3 charity. Evidence was introduced to demonstrate that the museum is a far more sizeable institution than the other charities which comprise group 3.

Although the evidence shows that the Museum of Science and Industry is similar in many respects to some institutions listed as group 1 charities, we cannot find that the listing of this institution as a group 3 charity is against the manifest weight of the evidence. The record reflects that the testator had visited the museum a limited number of times and had only a limited contact with and a general interest in this institution.

We next consider plaintiffs' contentions in regard to the allocation of the \$6.5 million of funds in excess of the specific dollar amount of the court-approved plan. Plaintiffs contend that we should, at the least, direct that the circuit court conduct new proceedings and frame a scheme of dis-

tribution for the additional funds. Under the particular facts of the case, we find no reason to do so.

Under the court-approved plan, charities listed under groups 1 and 2 are to share in the excess funds on a *pro rata* basis. We find this aspect of the plan to be supported by the evidence. With the exception of the Museum of Science and Industry, only smaller charities with minimal contact with testator's sphere of interest were included in group 3. IIT is the only other charity which is precluded from taking a *pro rata* share of the excess funds, and the court could well have concluded that IIT's share of the estate was already of sufficient size. We cannot say that the circuit court's adoption of this aspect of the bank's plan is inequitable or contrary to the manifest weight of the evidence.

We finally consider whether the court awarded excessive or unwarranted attorneys' fees and trustee fees to the Stuart sisters. This issue is raised by a number of the charitable intervenors. The circuit court granted specific fees to the sisters and their attorneys following a special hearing on the matter, and the appellate court affirmed.

The facts relevant to this issue are fully stated in the opinion of the appellate court. (43 Ill. App. 3d 169, 202-03). We shall restate only those facts deemed necessary to an understanding of our disposition of this issue. Intervenors basically contend that the Stuart sisters had no authority to employ counsel or to charge the trust estate for such fees. It is also alleged that the attorneys' services were performed for the benefit of IIT rather than the sisters, and, thus, are not chargeable to the estate. We do not agree and therefore affirm the judgments of the circuit and appellate courts.

The determination of the need for attorneys' fees and the amount of such fees is a decision which rests in the discre-

tion of the trial court. (*Ingraham v. Ingraham* (1897), 169 Ill. 432, 471-72). The trial court did not abuse its discretion by finding that the Stuart sisters justifiably retained counsel and commenced the present litigation. The trustees were hopelessly deadlocked over the manner in which they should discharge their duties as trustees, and resort to the courts was necessary to resolve the impasse. Where, as here, the litigation is the result of honest differences of opinion, attorneys' fees and litigation expenses will be chargeable to the estate. (*Orme v. Northern Trust Co.* (1962), 25 Ill. 2d 151, 165.) We hold that the trial court did not abuse its discretion by charging attorneys' fees and expenses incurred by the Stuart sisters to the estate or by approving the payment of trustee fees to the individual co-trustees.

Nor do we accept the intervenor's contention that the estate was charged for services performed on behalf of IIT. This contention stems from the fact that the same attorney represented both IIT and the Stuart sisters for a period of approximately 2 years. The attorney withdrew as counsel for IIT before the actual trial of the case. As the appellate court noted, the trial judge was aware of this period of dual representation and suggested that the fees be distributed between the sisters and IIT. Thereafter, a substantial reduction in the requested fees was made. We, therefore, hold that the trial court did not abuse its discretion in regard to the allocation of the fees and expenses incident to this litigation.

The judgments of the circuit court of Cook County and of the appellate court are affirmed in part and reversed in part, and the cause is remanded for modifications and further proceedings consistent with this opinion.

*Affirmed in part and reversed in part
and remanded, with directions.*

APPENDIX B

UNITED STATES OF AMERICA

STATE OF ILLINOIS }
SUPREME COURT } ss.

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the twelfth day of September in the year of our Lord, one thousand nine hundred and seventy-seven, within and for the State of Illinois.

PRESENT: DANIEL P. WARD, CHIEF JUSTICE	JUSTICE ROBERT C. UNDERWOOD	JUSTICE JOSEPH H. GOLDENHERSH
JUSTICE HOWARD C. RYAN	JUSTICE WILLIAM G. CLARK	JUSTICE THOMAS J. MORAN
WILLIAM J. SCOTT, ATTORNEY GENERAL	LOUIE F. DEAN, MARSHAL	JUSTICE JAMES A. DOOLEY

ATTEST: CLELL L. WOODS, CLERK

BE IT REMEMBERED, that, to-wit: on the 5th day of October, A.D. 1977, the same being one of the days of the term of Court aforesaid, the following proceedings were by said Court, had and entered of record, to-wit:

The Northern Trust Company, as executor of the Estate of Harriet F. B. Stuart, deceased, not individually but as a co-executor and as a co-trustee under the Last Will and Testament of Harold L. Stuart, Deceased, Elizabeth B. Stuart, not individually but as a co-executor and as a co-trustee under the Last Will and Testament of Harold L. Stuart, Deceased, and Illinois Institute of Technology, a not-for-profit corporation, Elizabeth B. Stuart, not individually but as a co-executor and as a co-trustee under the Last Will and Testament of Harold L. Stuart, Deceased, and Illinois Institute of Technology, a not-for-profit corporation,

Appellants,

No. 49070

vs.

Continental Illinois National Bank and Trust Company of Chicago, a national banking association, not individually but as a co-executor and as a co-trustee under the Last Will and Testament of Harold L. Stuart, Deceased, Museum of Science and Industry, The Art Institute of Chicago, De Paul University, Northwestern University, Field Museum of Natural History, The American Red Cross, The Orchestral Association, Children's Memorial Hospital, Mercy Hospital and Medical Center, Rush-Presbyterian-St. Luke's Hospital, Lyric Opera of Chicago, Chicago Boys Clubs, The Salvation Army-Chicago Chapter, YMCA of Metropolitan Chicago, and Chicago Historical Society, et al.,

Appeal from
Appellate Court
First District
62037
70 CH 4196

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the records and proceedings of the Appellate Court for the First District and the Circuit Court of Cook County, as the matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises, are of the opinion that in the records and proceedings aforesaid, and in the rendition of the judgments of the Appellate Court for the First District and the Circuit Court of Cook County, there is manifest error.

THEREFORE, it is considered by the Court that for that error and others in the records and proceedings aforesaid, the judgments of the Appellate Court for the First District and the Circuit Court of Cook County, in this behalf rendered, BE AFFIRMED IN PART AND REVERSED IN PART in the respects set out in the opinion of this Court, and that this cause be remanded to the Circuit Court of Cook County for modifications and further proceedings consistent with the opinion attached to this mandate.

And it is further considered by the Court that the said appellants recover of and from the said appellees costs by them in this behalf expended, to be taxed and that they have execution therefor.

I, CLELL L. WOODS, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court this 2nd day of December, A.D. 1977.

CLELL L. WOODS
Clerk,

Supreme Court of the State of Illinois.

APPENDIX C

IN THE

SUPREME COURT OF ILLINOIS

ELIZABETH B. STUART, not individually, but as a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased, and ILLINOIS INSTITUTE OF TECHNOLOGY, a not-for-profit corporation,

Plaintiffs-Appellants,

vs.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a national banking association, not individually, but as a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased.

Defendant-Appellee,

CHICAGO HISTORICAL SOCIETY, et al.,

Intervenors, Defendants-Appellees.

Appeal from the Circuit Court of Cook County, Illinois Chancery Division No. 70 CH 4196, there heard on remand from the Supreme Court of Illinois, Nos. 49070 and 49074 Consolidated

Honorable Francis T. Delaney Circuit Judge Presiding

OPINION FILED JANUARY 26, 1979—REHEARING DENIED MARCH 30, 1979.

MR. JUSTICE RYAN delivered the opinion of the court:

This appeal is a sequel to *Stuart v. Continental Illinois National Bank & Trust Co.* (1977), 68 Ill. 2d 502. Upon remand by that opinion, Elizabeth Stuart and the Illinois Institute of Technology (hereinafter IIT) sought to recover "increases, gains, income or profits" accumulating after June 30, 1971, on the \$3.5 million granted IIT by the earlier opinion of this court. The circuit court of Cook County dismissed the petition and ruled that only the \$3.5 million should be distributed to IIT.

The primary issue posed now by Miss Stuart and IIT is whether our earlier opinion gave IIT a right to interest, dating from June 30, 1971, on its grant of \$3.5 million. We

hold that the \$3.5 million grant is the total amount to which IIT is entitled.

The protracted litigation involving the will of Harold Stuart has been recounted in earlier proceedings (see 68 Ill. 2d 502; *Northern Trust Co. v. Continental Illinois National Bank & Trust Co.* (1976), 43 Ill. App. 3d 169), and this particular appeal does not require a complete restatement of those facts. Harold Stuart died on June 30, 1966, leaving a substantial estate. His will provided for the creation of a large charitable trust, with his two sisters and the Continental Bank as trustees. The trustees had the power to designate the charities to whom the assets of the estate would be distributed. Under the provisions of that trust, the bank could veto any distribution ordered by the two sisters. The trustees were unable to agree on a distribution plan, so the circuit court was called on to establish a plan of distribution. The court adopted almost the entire plan submitted by the bank. The two sisters had requested that three-fourths of the trust go to IIT, while the plan approved by the court called for much wider distribution.

In our earlier opinion we examined three major issues relevant to this appeal. First, we found that the bank had wrongfully distributed \$250,000 to an unqualified charity, and we ordered the money returned, with interest, to the trust. Second, we found that the bank and the two sisters had both designated an additional distribution of \$3.5 million to IIT. We ordered disbursement of that amount to IIT. Third, we found that any excess funds should be distributed according to the plan as set forth by the circuit court. Our opinion had, accordingly, dealt with all funds available for distribution. We remanded that case for entry of appropriate orders.

On the remand, Miss Stuart and IIT filed a petition for accounting which asked the bank to supply information on all increases, gains, income or profits, accruing after June

30, 1971, on the \$3.5 million, and asked that an order be entered directing the bank to distribute that money to IIT. The circuit court dismissed that petition and a direct appeal under Rule 302(b) (58 Ill. 2d R. 302(b)) was granted.

In the earlier opinion of this court, it was clearly stated:

"We hold, therefore, that upon remand an order be entered directing that an additional \$3.5 million of the estate be distributed to IIT." (*Stuart v. Continental Illinois National Bank & Trust Co.* (1977), 68 Ill. 2d 502, 536.)

It is impossible to negate every possible issue in an opinion and therefore the rule is that "[w]here *** the directions of a reviewing court are specific, a positive duty devolves upon the court to which the cause is remanded to enter an order or decree in accordance with the directions contained in the mandate. Precise and unambiguous directions in a mandate must be obeyed." (*Thomas v. Durchslag* (1951), 410 Ill. 363, 365.) While we did not specifically exclude an increase of the IIT grant in the earlier opinion, neither did we include it, and we specifically directed that \$3.5 million be distributed to IIT. In contrast, our earlier opinion specifically provided for interest on the \$250,000 the Continental Bank would be required to return to the trust (68 Ill. 2d 502, 526). The circuit court followed our instructions and was correct in dismissing a claim for additional funds.

Our earlier opinion effectively distributed all the proceeds of the Stuart trust. On that appeal, IIT contended that the trial court, in adopting its plan for distribution, had erred in not including IIT in the *pro rata* distribution of \$6.5 million of the funds in excess of the amount required to satisfy all specific grants. Monies in excess of the specific grants were ordered to be distributed to designated group 1 and group 2 charities, as established in the distribution plan, on a *pro rata* basis. We specifically

limited IIT's grant to \$3.5 million by holding that they were to receive none of the excess funds. As we stated, "IIT is the only other charity which is precluded from taking a *pro rata* share of the excess funds, and the court [the initial trial court] could well have concluded that IIT's share of the estate was already of sufficient size." (68 Ill. 2d 502, 538.) The \$6.5 million included interest or earnings that could well have been attributed to the \$3.5 million which this court held should be distributed to IIT. When the matter was presented to the circuit court for a plan of distribution, the \$3.5 million was not a segregated fund but was a part of the total assets of the estate, for which the court was asked to form a plan of distribution. Plaintiffs had, at one time, stated in writing that IIT should receive \$3.5 million in addition to that which had previously been distributed to it. However, when that amount was agreed to by the bank, plaintiffs insisted that IIT should receive three-fourths of the total estate. Although in our previous opinion we characterize the bank's action of withdrawing its proposal of the additional grant as "arbitrary and unreasonable" (68 Ill. 2d 502, 536), it should be noted that, at the time of the withdrawal, plaintiffs did not agree to a distribution to IIT of only an additional \$3.5 million. The court was then called upon by *both* parties to formulate a plan of distribution of the entire fund. This the court did, excluding IIT from any share in the accumulated excess. Our opinion stated that we could not say that the circuit court's holding in adopting this plan was inequitable or contrary to the manifest weight of the evidence. The present contention of the plaintiffs is, in effect, asking this court to reconsider at least a part of the distribution plan which we have previously approved.

IIT suggests that our finding that "the circuit court erred in its denial of the relief requested by plaintiff IIT in count

III" (68 Ill. 2d 502, 533) gave IIT a vested right to the \$3.5 million retroactive to June 30, 1971. IIT argues that because it had a vested right to the money, it had a right to the accumulated interest on that money. In particular, it relies on article V(e) of the Stuart will, which provides:

"[T]he Executors shall, prior to the expiration of such period of five (5) years after my death, select in writing the qualified charitable organizations to take hereunder and the proportion of my estate each such organization is to receive, and the interest of each such charitable organization shall vest at the expiration of such five-year period."

Harold Stuart died on June 30, 1966, thus making June 30, 1971, the date of "vesting."

The term "vest" does not have a single, fixed, clear and precise meaning. Whether found in a statute or in a document, the word must be construed with reference to, and take its meaning from, the context of the provision where it is found. It may be used "when there is an immediate right to present enjoyment or a present fixed right of future enjoyment" of property. (2 W. James, Illinois Probate Law & Practice sec. 43.74, at 50 (1951). See also *Pearson v. Hanson* (1907), 230 Ill. 610, 617; 92 C.J.S. 1002 (1955).) Once the designation had been made by the Stuart sisters and the bank, the interest became fixed or "vested" and could not be altered by the bank's subsequent withdrawal of the proposal, or by the plaintiffs' rejection of the \$3.5 million grant and their demand for a grant to IIT of three-fourths of the estate. However, in the context of the will, the enjoyment of the fixed or vested interest was to be delayed until distribution. Because of the litigation wherein both parties requested the court to approve plans for distribution, the right to the enjoyment of the \$3.5 million was delayed until the lower court ordered distribution upon remand. "Vest," as used in the Stuart will, meant

only that once the designation had been made, it could not be withdrawn. IIT was given a present fixed right to future enjoyment upon distribution, not a present possessory interest. The vested interest of IIT did not carry with it the right to interest on the amount of the grant from June 30, 1971.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

MR. JUSTICE UNDERWOOD, dissenting:

I believe that it was implicit in our earlier opinion in this case that IIT was entitled to interest on its grant of \$3.5 million. In our October 1977 opinion it was determined "that the circuit court erred in its denial of the relief requested by plaintiff IIT in count III of the second amended complaint." (68 Ill. 2d 502, 533.) While that opinion did not refer specifically to the question of interest on the \$3.5 million, the relief requested by plaintiff IIT in count III of its second amended complaint included an amount for "increases, gains, earnings or profits" on the \$3.5 million grant. Since the majority opinion concedes that "we did not specifically exclude an increase of the IIT grant in the earlier opinion," it would seem more logical to resolve the ambiguity by referring to the pleadings to determine what relief was requested, since we concluded that the circuit court had erred in its denial of the relief requested by IIT.

More fundamentally, however, it seems contrary to logic and reason to declare, on the one hand, that IIT had a vested right to the \$3.5 million grant as of June 30, 1971, but on the other hand to deny IIT any right to the interest which accrued on this grant during the subsequent course of this protracted litigation. The result reached by the

majority seems especially unsound when one considers article V(e) of the Stuart will, which provides:

"[T]he Executors shall, prior to the expiration of such period of five (5) years after my death, select in writing the qualified charitable organizations to take hereunder and the proportion of my estate each such organization is to receive, and the interest of each such charitable organization shall vest at the expiration of such five-year period." (Emphasis added.)

Since IIT was selected as a charitable organization to take under the will within the 5-year period immediately following the testator's death on June 30, 1966, its interest "vested" on June 30, 1971, pursuant to the express terms of the will.

Despite this fact, the majority opinion concludes that this vested right only entitles IIT to the principal amount of \$3.5 million upon distribution, following the termination of this lengthy litigation. This view is based upon what I believe to be an overly restrictive interpretation of the word "vest." The majority opinion concludes that IIT's vested interest gave it a "present fixed right to future enjoyment upon distribution" and only guaranteed IIT that once it had been designated as a charitable organization to receive under the will, such designation could not be withdrawn.

I find it difficult to accept such an inequitable construction of the Stuart will. I concede that the word "vest" may have a different meaning depending on its legal context, but I would contend that there is no basis in the language of the will for the conclusion reached by the majority. On the contrary, I think that a careful analysis of the Stuart will reveals that the testator used the word "vest" in the usual sense of an immediate right to present enjoyment.

Article V(d) of the Stuart will, which the majority opinion fails to discuss, provides as follows:

"The executors acting as trustees may, in their sole judgment and discretion, accumulate the net income of the trust estate and add the same to principal (*provided the accumulations shall not take place for more than five years*), or may from time to time distribute the net income, or such part thereof, as the trustees in their sole judgment and discretion may deem proper, to such qualified charitable organizations *as the trustees may select.*" (Emphasis added.)

This clause, to me, demonstrates the testator's intent that accumulations of net income may be added to the general residue of the trust estate only for the 5-year period immediately following the testator's death. The only reasonable interpretation of this clause, when read in conjunction with article V(e), is that the testator intended the charitable organizations designated within the prescribed 5-year period to come into present enjoyment and possession of their grants on June 30, 1971. After that date, any accumulation of interest would belong, as of right, to the appropriate designated charity and could not be added to the general residue of the trust estate.

Clearly, if the executors had been successful in designating the charities to take under the will and the proportion each was to receive pursuant to article V(e), there would be no doubt that under article V(d) any further accumulations of income prior to distribution would accrue to the benefit of the appropriate charity. The fact that the executors failed to reach agreement prior to June 30, 1971, on the charitable organizations, other than IIT, to take under the will should not operate to deprive IIT of interest that it would otherwise have been indisputably entitled to. The prohibition in article V(d) against accumulations of net income subsequent to the "vesting" date of June 30, 1971,

reinforces my belief that the testator used the word "vest" to connote present enjoyment and possession, including the right to receive all "increases, gains, earnings or profits" accruing after the vesting date. I would allow IIT interest on the \$3.5 million from the date of vesting, June 30, 1971.

MR. JUSTICE MORAN joins in this dissent.

APPENDIX D

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

HARRIET F. B. STUART, not individually,
but as a co-executor and as a co-trustee under
the Last Will and Testament of Harold L.
Stuart, deceased, ELIZABETH B. STUART,
not individually but as a co-executor and as a
co-trustee under the Last Will and Testament
of Harold L. Stewart, deceased, and ILLI-
NOIS INSTITUTE OF TECHNOLOGY, a
not-for-profit corporation,

Plaintiffs,

No. 70 CH 4196

vs.

CONTINENTAL ILLINOIS NATIONAL
BANK AND TRUST COMPANY OF CHI-
CAGO, a national banking association, not in-
dividually but as a co-executor and as a co-
trustee under the Last Will and Testament of
Harold L. Stuart, deceased,

Defendants.

SECOND AMENDED COMPLAINT

Plaintiffs HARRIET F. B. STUART and ELIZABETH
B. STUART, not individually but as co-executors and as
co-trustees under the Last Will and Testament of Harold
L. Stuart, deceased, by their attorneys, SCHIFF HARDIN
WAITE DORSCHEL & BRITTON, and ILLINOIS IN-
STITUTE OF TECHNOLOGY ("IIT"), a not-for-profit
corporation, by its attorneys, WITWER, MORAN &
BURLAGE, having first obtained leave of Court, complain
of defendant CONTINENTAL ILLINOIS NATIONAL
BANK AND TRUST COMPANY OF CHICAGO, a na-
tional banking association, not individually but as a co-

executor and a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased, as follows:

• • • •

[Counts I & II are omitted as not relevant herein.]

COUNT III

Plaintiff, ILLINOIS INSTITUTE OF TECHNOLOGY, ("IIT"), a not-for-profit corporation, hereby pleads alternatively, amending the Amended Complaint by adding separate alternate Counts, designated Counts III and IV.

1-12. Plaintiff incorporates by reference paragraphs 1 through 12, inclusive, of Count II as paragraphs 1 through 12, respectively, of this Count III.

[Paragraphs 1 through 12, as so incorporated,
are as follows:]

1. On April 23, 1964, decedent Harold L. Stuart (sometimes hereinafter referred to as "the decedent") executed his Last Will and Testament (the "Will"), a copy of which is attached hereto as Exhibit A.

2. Harold L. Stuart died in Chicago, Illinois, on June 30, 1966. The Will was admitted to probate on August 29, 1966, in the Circuit Court of Cook County, Illinois. The defendant, CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a national banking association with its principal place of business located in Cook County, Illinois (hereinafter sometimes referred to as the "corporate trustee") is duly qualified and acting co-executor and co-trustee under the Will. Plaintiffs HARRIET F. B. STUART and ELIZABETH B. STUART, sisters of the decedent (hereinafter referred to as the "family trustees") are also duly qualified and acting co-executors and co-trustees under the Will.

3. On March 10, 1967, the inventory and appraisement of the estate of Harold L. Stuart, showing assets in the amount of \$33,694,383.35 was filed in the Circuit Court of Cook County, Illinois.

4. The situs of the property of the estate has been at all times and still is in Cook County, Illinois.

5. The Will provides that after payment of certain expenses, the distribution of certain bequests and the creation of certain trusts, as provided in Articles FIRST through THIRD, the remainder of the estate of Harold L. Stuart is to be held in trust (the "Trust") and distributed to "qualified charitable organizations", as defined in Article FOURTH of the Will, by the executors and trustees. The amount available for distribution to qualified charitable organizations pursuant to the provisions of the Will was approximately \$20,000,000.

6. Article FIFTH (e) of the Will provides that the selection of qualified charitable organizations pursuant to the terms of the Will shall take place not more than five years after the death of decedent; that is to say, June 30, 1971. Article FIFTH (e) provides as follows:

"(e) Upon the completion of the sale of all stock or assets, as the case may be, of HALSEY, STUART & CO., INC., the net proceeds of such sale shall, after payment of all expenses of administration and the creation of the trust for the benefit of my sisters provided for in article THIRD hereof, be distributed to such qualified charitable organizations as may be selected by my Trustees. Such distribution to qualified charitable organizations shall take place not more than five (5) years after my death. If for any reason it shall not be possible or practicable to complete distribution within that time, the Executors shall, prior to the expiration of such period of five (5) years after my death, select in writing the qualified charitable organizations to take hereunder and the proportion of my estate each such organization is to receive, and the interest of each such charitable organization shall vest at the expiration of such five year period."

7. Prior to August 1, 1966, charitable organizations began submitting proposals to the trustees for favorable action by the trustees in selecting the distributees of the Trust corpus.

8. IIT is a not-for-profit corporation organized and existing under the laws of the State of Illinois. IIT is a university offering instruction and conferring baccalaureate, graduate, and professional degrees in the fields of engineering, law, finance and the arts and sciences. IIT's enrollment consists of approximately 3,000 full-time and approximately 4,500 part-time students who attend facilities located primarily in the City of Chicago, Cook County, Illinois. IIT is a "qualified charitable organization" within the meaning of Article FOURTH of the Will.

9. On or about February 9, 1967, HARRIET F. B. STUART, on behalf of the family trustees, contacted IIT and expressed the interest of the family trustees in IIT as a beneficiary of the trust estate.

10. On or about May 29, 1968, HARRIET F. B. STUART, on behalf of the family trustees contacted IIT and expressed the decision of the family trustees that IIT receive a substantial portion of the trust estate.

11. The decision made by the family trustees was based upon the following facts:

(a) As president and sole stockholder of the investment banking firm of Halsey, Stuart & Co., Harold L. Stuart had a lifelong commitment to the investment and finance business. He especially wished to see more young men obtain a sound educational foundation in the investment and finance business and make that profession their career.

(b) For a period of approximately six months prior to the death of Harold L. Stuart, he frequently ex-

pressed his desire to the family trustees, his sisters with whom he lived, that a large portion of his estate, to be distributed pursuant to the Will, go to IIT for the construction and endowment of a school of management and finance and for other purposes.

(c) Harold L. Stuart attended Lewis Academy of Chicago between September 1896 and January 1900. Lewis Academy was a pre-college academy associated with Lewis Institute. IIT was formed in 1940 by a merger of Lewis Institute and the Armour Institute of Technology. Accordingly, the only educational institution in the Chicago area (where the decedent lived from 1891 until his death) with which the decedent was associated both during student days and thereafter was IIT. IIT is a major private university in the Chicago area offering undergraduate and graduate degrees in management, finance and related fields. Accordingly, the most appropriate institution for establishment of a school to carry on and foster the goals and interests of the decedent was and is IIT.

12. On or about August 2, 1968, at the request of the family trustees, IIT submitted to the trustees a formal proposal for a grant from the Trust to be used to establish the Harold Leonard Stuart School of Management and Finance (the "Stuart School") at IIT.

13. Believing that IIT should receive three-fourths ($\frac{3}{4}$ ths) of the distributable estate to carry out the aforesaid proposal for the Harold Leonard Stuart School of Management and Finance and believing that such $\frac{3}{4}$ ths proportion would be not less than \$8,500,000 in amount; the family trustees, on October 15, 1968 caused to be delivered to the corporate trustee an instrument in writing dated October 10, 1968, signed by them, selecting IIT as a qualified charitable organization under the Will and designating IIT to receive distribution from the Trust of \$8,500,000. A copy of said instrument is attached hereto, designated Exhibit F and incorporated herein by reference.

14. The family trustees' selection of IIT to receive a grant of \$8,500,000 was initially only in part approved and concurred in by the corporate trustee, namely, to the extent of \$5,000,000. On or about April 3, 1969 the trustees made a commitment to IIT of a grant of \$5,000,000, conditioned upon a matching grant of \$1,000,000 by IIT from its own funds, the aggregate to be used to establish the Stuart School. The grant of \$5,000,000 by the trustees has since been paid by the Trust to IIT and the matching grant of \$1,000,000 has since been provided by IIT from its own funds. A building has been constructed for the Harold Leonard Stuart School of Management and Finance, pursuant to the original proposal, and the school has commenced operation of undergraduate and graduate programs. Despite the corporate trustee's initial failure to concur and join in the full \$8,500,000 grant to IIT, the family trustees continued after April 3, 1969 to insist upon full payment of their designated grant to IIT and continued to request the corporate trustee to commit at least \$3,500,000 to IIT.

15. By letter dated October 7, 1970, addressed and delivered to the family trustees by the corporate trustee, a copy of which is attached hereto, designated Exhibit C, and incorporated herein by reference, the corporate trustee proposed, *inter alia*, a further commitment of \$3,500,000 to IIT, being the amount of the unpaid balance of the original grant of \$8,500,000 to IIT designated by the family trustees, after taking into account the \$5,000,000 grant payment theretofore made. Notwithstanding such additional designation of \$3,500,000 for IIT by the corporate trustee complementing and concurring in the family trustees' original proposal, the corporate trustee wrongfully and in violation of its trust duties subsequently refused to accede to and to distribute any part of such additional grant of \$3,500,000 to

IIT and proposed a new program of distributions which eliminated any further provision for IIT. The corporate trustee has sought to justify its said refusal by erroneously contending that its specific designation of IIT on October 7, 1971 was conditional only and dependent upon acquiescence of the family trustees in numerous grants out of the trust estate desired to be made by the corporate trustee.

16. Under the provisions of the Will the distributive powers of the trustees were to select within five (5) years following his death qualified charitable organizations as therein defined and to designate the amounts to be distributed thereto, but no authority was granted to any trustee to exercise its distributive power in a bargaining or trading manner, nor conditionally upon submission of any other trustee to its desires. The true purport and effect in law and equity of the corporate trustee's specific selection and designation of IIT to receive an additional grant of \$3,500,000 was an immediate written selection, within the meaning of the provisions of the Will, of IIT as a qualified charitable organization and its effective and unconditional designation to receive the additional grant of \$3,500,000. Said written selection and designation by the corporate trustee occurred while the written selection and designation of IIT by the family trustees remained in full force and effect and while it was pending as to the unpaid balance of \$3,500,000 of the initial proposed grant of \$8,500,000. Accordingly, the corporate trustee's written proposal of October 7, 1970 resulted in a concurrent and conjoint specification and designation by all trustees providing that IIT should receive the further sum of \$3,500,000.

17. The aforesaid conjoint written selections and designations of IIT by all trustees to receive the further sum of \$3,500,000 from the trust estate occurred within five (5) years following the death of Harold L. Stuart and accord-

ingly under the provisions of Article FIFTH (e) of the Will, the additional grant of \$3,500,000 to IIT became vested and indefeasible and in equity was funded. As soon as practical after June 30, 1971, the fifth anniversary of decedent's death, it was and became the duty of the trustees to pay said additional sum of \$3,500,000 to IIT together with any increase, gains, earnings or profits, which have been received or accrued with respect to that fund after June 30, 1971.

18. At all times IIT has been a qualified charitable organization within the meaning of the provisions of Articles FIFTH and SIXTH of the Will, and the trust assets currently available for charitable donation under the Will have at all times material hereto far exceeded the sum of \$3,500,000. While the family trustees desire the payment thereof to IIT, the corporate trustee wrongfully persists in its refusal to make payment thereof.

19. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff IIT prays, in the alternative, that the Court find and decree as follows:

1. That an additional grant of \$3,500,000 be distributed out of the corpus of the trust to IIT, together with any increase, gains, income or profits which have accrued to or been derived from the fund of \$3,500,000 after June 30, 1971, in discharge of the vested grant to IIT made by the trustees as set forth in the foregoing paragraphs of this Count III.

2. That IIT have such further or other relief as equity may require.